Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of BellSouth Corporation,	)	CC Docket No. 97-231
BellSouth Telecommunications, Inc.	)	
and BellSouth Long Distance, Inc.	)	
for Provision of In-Region, InterLATA	)	
Services in Louisiana	)	

REPLY COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

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EXECUTIVE SUMMARY

MCI addresses in these Reply Comments the following points:

1) The Commission should not defer to the conclusions of the Louisiana Public Service Commission ("LPSC") because the LPSC, over MCI's objection, limited its review to a Track B analysis of the paper promises contained in BellSouth's SGAT. The LPSC did not analyze any of the requisite issues presented by the "Track A" application BellSouth submitted to this Commission.

2) The conclusion of the Department of Justice that PCS service is not a substitute for wireline service is consistent with this Commission's identical finding. PCS providers cannot, therefore, be deemed "competing providers of telephone exchange service" under Track A of section 271.

3) The Department of Justice correctly concluded that prices for network elements must be geographically deaveraged. However, the Department incorrectly concluded that deaveraging is not required prior to section 271 approval. The Act, the Commission's regulations, and the Commission's decision in the Ameritech Michigan proceeding unambiguously require that cost-based rates be established prior to section 271 approval. The Commission has already found that rates that are not deaveraged are not cost-based.

4) For reasons MCI expands upon below, AT&T correctly states in its comments that the requirement that BellSouth allow CLECs physical access to BellSouth's network, in a form other than collocation, does not constitute an unconstitutional taking.

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I. THE COMMISSION SHOULD NOT DEFER TO THE DECISION OF THE LOUISIANA PUBLIC SERVICE COMMISSION.

A. As BellSouth Concedes, the Act Requires the FCC to Exercise Independent Judgment.

The Louisiana Public Service Commission ("LPSC") argues that the FCC should approve BellSouth's application because the LPSC found in the state proceeding that the requirements of section 271 had been met. See Comments of the LPSC, at 1 (Nov. 25, 1997) ("LPSC Comments"); see also BellSouth Brief in Support of Application for Provision of In-Region, InterLATA Services in Louisiana (Nov. 6, 1997) ("BST Br."), at 5, 41 (arguing that FCC should give deference to LPSC's conclusions and conclusive effect to LPSC's pricing determinations). This argument is flawed for several reasons. First, the Act makes clear that only the

recommendation of the Department of Justice is entitled to substantial weight. Congress conspicuously and deliberately chose not to require the Commission to give any particular weight to comments of state commissions. That the Act requires the FCC to afford substantial weight only to the Department's findings belies any claim that the FCC must afford substantial weight -- let alone controlling weight -- to a state commission's findings.

Indeed, BellSouth has implicitly conceded the point. Relying on University of Tennessee v. Elliott, 478 U.S. 788, 795 (1986), for the proposition that the duty to afford substantial weight to an agency's findings does not mean affording those findings "preclusive effect," BellSouth has argued previously that the FCC should not simply adopt the recommendation of the Department of Justice, but must instead exercise independent judgment.[1] It is of course true that the FCC cannot give preclusive effect to the Department's recommendation -- independent of the Elliott decision, the Act explicitly states that "[t]he Commission shall give substantial weight to the Attorney General's evaluation, but such evaluation shall not have any preclusive effect on any Commission decision ...." 47 U.S.C. § 271(d)(2)(A). But this argument proves too much. If the FCC must exercise independent judgment when it is required at the same time to afford substantial weight to an agency's recommendation, it necessarily follows that the FCC must exercise independent judgment when it has not been directed to give substantial weight to an agency's decision, as is the case with state commission findings. Thus, BellSouth's repeated

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[1] See BellSouth's Reply Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in South Carolina (CC Docket No. 97-208), at 26-27 & n.25.

arguments that the FCC must abide by the findings of the LPSC cannot be squared with the text of the Act, Supreme Court precedent, or BellSouth's discussion of Elliott.

B. The LPSC Limited Its Analysis to the Paper Promises in BellSouth's SGAT.

The LPSC concedes in its Comments that its analysis was limited to a review of BellSouth's SGAT. See, e.g., LPSC Comments at 1 ("Through the LPSC's 271 hearings, the LPSC reviewed BellSouth's SGAT and found that it satisfied the 14-point checklist ..."); id. at 2, 7-8, 9 (same). Indeed, the LPSC concedes that it remanded the matter to an administrative law judge and staff "for their recommendation limited to whether [BellSouth's] ... SGAT complies with the 14-point checklist." LPSC Comments at 6 (emphasis added).

Notably absent from the LPSC's decision and Comments in this proceeding is any discussion of BellSouth's actual ability to provide in fact, and not just offer on paper, critical checklist items such as loops. For example, the LPSC concludes that BellSouth meets checklist item 4 (loops) simply because its SGAT "offers" loops, i.e., the SGAT lists 2-wire, 4-wire and other loops. LPSC Comments at 13. Not a word is mentioned of whether BellSouth has shown it has provided loops reliably and on reasonable and nondiscriminatory terms in its region, and not a word is mentioned about CLECs' problems in trying to obtain loops from BellSouth throughout its region. The same is true of the LPSC's analysis of every other checklist item. For example, the LPSC concludes that checklist item 14 (resale) is met because the SGAT includes the resale discount rate. LPSC Comments at 19. No mention is made of the multiple OSS problems that prevent CLECs from obtaining resold services on reasonable, nondiscriminatory

terms.

In short, the LPSC did not analyze whether BellSouth has "actually furnishe[d]" checklist items competitors have asked for, let alone whether BellSouth has made all checklist items available as a "practical matter" -- the standards set forth by the Commission in the Michigan Order (¶ 110).[2] See also Evaluation of the United States Department of Justice (Dec. 10, 1997) ("DOJ Eval."), at 18 & n.29 (LPSC did not apply legal standard explained in Michigan Order despite requests that it delay its decision in order to analyze the Michigan Order). In contrast, the Florida PSC and the Department of Justice both followed this Commission's dictates in their detailed analyses of BellSouth's region-wide OSS. The Department's findings that BellSouth's OSS falls far short of the requirements of the Act is entitled to substantial weight, and the Florida PSC's detailed analysis of OSS implementation problems is certainly entitled to more weight than the LPSC's cursory SGAT review.

BellSouth is at a loss to explain why the Florida PSC's more recent, and far more thorough, analysis of BellSouth's OSS should not trump the LPSC's one-sentence finding on OSS. Indeed, BellSouth has since heaped praise on the Florida PSC, in the context of its arbitration decisions, noting that "[t]he PSC has carried out its assigned duties conscientiously and, in nearly every instance, in a manner fully consistent with the 1996 Act." BellSouth's Reply Brief in Support of its Counter and Cross-Claims, at 1, MCI Communications Corp. v.

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[2]Application of Ameritech Michigan to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, Mem. Opinion and Order (rel. Aug. 19, 1997) ("Mich. Order").

BellSouth Corp., No. 497CV141-RH (N.D. Fla.) (Nov. 28, 1997) (ex. A hereto). BellSouth's position could not be more clear: an agency decision finding in favor of BellSouth must be given preclusive effect regardless whether it is supported by evidence or consistent with the Act, while an agency decision finding against BellSouth, however well reasoned, should be ignored.

C. BellSouth Must Bear the Consequences of its Tactical Decision to Ask the LPSC to Conduct Only a Track B Review.

The LPSC's decision to undertake a limited SGAT review rather than an analysis of checklist implementation could easily have been avoided. In a motion for declaratory order and partial summary judgment prior to the state hearings, MCI highlighted this very problem. MCI Telecommunications Corporation's Motion for Declaratory Order and Motion for Partial Summary Judgment, LPSC Docket No. U-22252 (April 30, 1997) ("MCI Motion") (BST App. C-1, Vol. 3, Tab 49). Because BellSouth was not eligible to proceed under Track B, MCI petitioned the LPSC to avoid the waste of resources of conducting a limited SGAT review. MCI asked for an order declaring BellSouth ineligible for Track B and establishing a hearing, whenever BellSouth was ready, to analyze whether BellSouth had implemented the competitive checklist. MCI Motion 1-2, 7. MCI asked for a Track A evaluation to be conducted at a later date because BST conceded at the time that it could not meet Track A. MCI Motion 6, 9 (citing testimony of BellSouth witness Varner).

The LPSC rejected MCI's motion[3] and instead limited its consideration to BellSouth's

[3] See Ruling on MCI Telecommunications Corporation's Motion for Declaratory Order and Motion for Partial Summary Judgment, Docket No. U-22252 (May 8, 1997) (BST App. C-1,

SGAT. Then, as MCI had predicted, BellSouth presented this Commission with a Track A application, rendering the LPSC's SGAT review irrelevant. BellSouth thus manipulated the review process exactly as it had planned -- preventing any review of checklist implementation at the state level. Indeed, BellSouth's manipulation of the section 271 process did not stop there. Having stated in sworn testimony before the LPSC that there were no Track A providers in Louisiana (and therefore that the LPSC should conduct an SGAT review),[4] BellSouth turned around and filed a Track A application before this Commission based on the existence of the same PCS providers who were in operation during the state proceeding. BellSouth's shell game should not be condoned. The Commission should give no weight to the LPSC's limited SGAT inquiry, and should hold BellSouth to its earlier position that there were no Track A providers in Louisiana even when PCS was being provided in the state.[5]

II. PCS PROVIDERS ARE NOT "COMPETING PROVIDERS OF TELEPHONE EXCHANGE SERVICE" UNDER TRACK A.

The Department of Justice had no difficulty concluding that PCS is not a substitute for wireline service because it is substantially more expensive than wireline and is priced differently

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Vol. 4, Tab 52).

[4] See Testimony of Alphonso Varner at 14 (BST App. C-1, Tab 24).

[5] Although the LPSC did not approve the PCS interconnection agreements until August, 1997, the fact that the PCS providers were operational and had signed interconnection agreements at least as early as May, 1997 (see DOJ Eval. App. B at B-13), rendered Track B unavailable under BellSouth's interpretation of the Act. BellSouth nevertheless pursued its "Track B" case before the LPSC.

(PCS subscribers pay usage charges for outgoing calls and for incoming calls). See DOJ Eval. 8. MCI identified several additional reasons why PCS is not a substitute for wireline service, including limitations on modem speeds and on the ability to have multiple handsets in a household. MCI Comments at 5-6. These facts are not seriously in dispute. Indeed, the Commission has already found, and recently reconfirmed, that PCS is not a substitute for wireline service.[6]

The Department deferred to the Commission on the question whether the Track A requirement of "competing providers of telephone exchange service" should be interpreted to require a service that is an effective substitute for wireline. DOJ Eval. 5-7. The Commission should have no difficulty reaching this conclusion; to interpret Track A otherwise would render its requirements meaningless and contradict the clear intent of Congress.

In requiring a Bell Operating Company ("BOC") to demonstrate the existence of a competing provider of telephone exchange service that provides service over its own facilities to business and residential customers, Congress set forth a threshold requirement for BOC entry into long distance. That requirement is intended to enable the Commission to weed out frivolous

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[6] See, e.g., In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Second Annual Report and Analysis of Competitive Market Conditions, FCC 97-75, at 52-55 (Mar. 25, 1997); In re: Application of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer Control of NYNEX Corp. and its Subsidiaries, FCC 97-286 ¶ 90 (rel. Aug. 14, 1997) ("BA/NYNEX Order"); In the Matter of Amendment of the Commission's Rules Regarding the 37.0-38.6 Ghz and 38.6-60.0 Ghz Bands, ET Docket No. 95-183, PP Docket No. 93-253, ¶ 33 (rel. Nov. 3, 1997); In re Applications of PacificCorp Holdings, Inc. Transferor and Century Telephone Enterprises, Inc., 1997 FCC LEXIS 5741, ¶ 24 (Report No. LB 97-49) (rel. Oct. 17, 1997).

applications and to ensure that there is some "tangible affirmation that the local exchange is indeed open to competition."[7]

The existence of PCS providers, as presently constituted, provides no such "tangible affirmation." An antitrust-type analysis of substitutability is precisely suited to achieve this Congressional goal of open markets. Antitrust principles used in deciding what products are in a market, and what providers compete to sell them, are based on reasonable, common-sense notions of competition and competitive alternatives. Only providers that are competing in the same market as the BOC in an antitrust sense -- providers whose product is "reasonabl[y] interchangeabl[e]" with that of the BOC, United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404 (1956) -- show anything about the openness of the local market. Indeed, determining whether a market is open to competition is the essence of antitrust analysis. See Reiter v. Sonotone Corp., 442 U.S. 330, 342 (1979).

The Commission recognized as much in concluding that a competing provider "must be an actual commercial alternative to the BOC." Okla. Order ¶ 14. Determining whether a product or service is an actual commercial alternative is precisely what the Department does in an antitrust analysis of substitutability.

BellSouth does not show that the existence of PCS providers proves anything about the openness of the local market, or in any other way fulfills the basic purposes of section

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[7] H.R. Rep. No. 104-204, pt. 1, at 76-77 (1995) (quoted in Application by SBC Communications, Inc., to Provide In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121, Mem. Opinion and Order ¶ 42 (rel. June 26, 1997) ("Okla. Order")).

271(c)(1)(A). BellSouth has not even attempted to establish, for example, that PCS providers have disciplined BellSouth's market power, or are even capable of doing so. Instead, BellSouth relies on Congress' express exclusion of cellular services to argue that Congress must have intended PCS providers to count as Track A providers. But Congress' exclusion of cellular providers shows exactly the opposite. The Commerce Committee's Report explains that:

> [t]he Committee does not intend for cellular service to qualify [for Track A], since the Commission has not determined that cellular is a substitute for local telephone service. The Committee expects the Commission to determine that a competitive alternative is operational and offering a competitive service somewhere in the State.

H.R. Rep. No. 104-204 at 77 (1995) (emphasis added). The Commission must therefore determine whether other technologies constitute an effective "substitute" for local wireline service. For PCS, the conclusion is inescapable that it is not today such a substitute, as the Commission and the Antitrust Division of the Department of Justice have already found.[8] It is also revealing that Sprint, an owner of PCS provider Sprint Spectrum, agrees that PCS is not "an effective landline substitute." Petition to Deny of Sprint Communications Co. at 11.

Finally, it is significant to note that until it filed its brief in this proceeding, BellSouth

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[8] At the time of the drafting and passage of the Telecommunications Act, PCS was in its infancy; Congress could not determine at the time whether it would some day differ from cellular service such that PCS could be an effective substitute for wireline service. It is apparent today, however, that PCS is essentially digital cellular service and is not materially different from cellular service. The possibility of PCS local loops has not materialized. It therefore follows from Congress' exclusion of cellular that PCS does not today constitute a "competing" telephone exchange service. To conclude that a service that walks, talks and acts like cellular is a "competing" service to wireline would do violence to Congress' intent.

understood that PCS providers are not competing providers within the meaning of Track A. In its initial testimony in the Louisiana state hearing in March, 1997, BellSouth testified under oath that there were no Track A providers in the state. Testimony of Alphonso Varner at 14 (BST App. C-1, Tab 24). At no time during the ensuing five months of section 271 proceedings and filings did BellSouth amend its testimony, even though PCS providers were in service in Louisiana at least as early as November, 1996 (PrimeCo) and May, 1997 (Sprint Spectrum), and had signed interconnection agreements as early as April, 1997. See DOJ Eval. App. B at B-13. BellSouth's post hoc characterization of PCS service in its brief to this Commission should be viewed with great skepticism in light of its more candid position before the Louisiana state commission.

III. PRICES FOR INTERCONNECTION AND UNBUNDLED NETWORK ELEMENTS MUST BE GEOGRAPHICALLY DEAVERAGED BEFORE THE COMMISSION CAN GRANT A SECTION 271 APPLICATION.

The Department's view that the Commission may grant a section 271 application even when the BOC's prices for interconnection and unbundled network elements are not geographically deaveraged, see DOJ Eval. 25-26, is inconsistent with the Act and the Commission's implementing regulations. The Department's position cannot be squared with section 271(d)(3)(A)(i)'s requirement that the BOC have fully implemented the competitive checklist at the time of filing a section 271 application. DOJ cannot avoid that contradiction by interpreting the checklist to require only a reasonable transition plan to implement geographic deaveraging in the future. Section 252(d)(1) requires rates to be cost-based now, not sometime

in the future. Moreover, averaged prices are independently inconsistent with section 254, which requires universal service support to be recovered in an equitable and nondiscriminatory manner from all providers of telecommunications services. In sum, the Act mandates that prices for interconnection and unbundled network elements be geographically deaveraged before the Commission can grant a section 271 application.

A. Section 271 Requires That the BOC Have Fully Implemented the Competitive Checklist at the Time the Section 271 Application Is Filed.

Section 271(d)(3)(A)(i) provides that the Commission shall not approve a section 271 application unless it finds that the petitioning BOC has satisfied the requirements of section 271(c)(1) and, "with respect to access and interconnection provided pursuant to subsection (c)(1)(A), has fully implemented the competitive checklist in subsection (c)(2)(B)." 47 U.S.C. § 271(d)(3)(A)(i) (emphasis added); see also Mich. Order ¶¶ 5, 9, 22, 105, 108, 282, 285. The Commission has interpreted this provision as requiring that the BOC "prove it is in compliance [with the checklist items] at the time of filing a section 271 application," and can be "relied upon to remain in compliance." Mich. Order ¶ 22 (emphasis added).

The first two competitive checklist items include pricing requirements, mandating that the BOC provide interconnection and nondiscriminatory access to network elements at prices "in accordance with" the pricing standards of section 252(d)(1). 47 U.S.C. § 271(c)(2)(B)(i), (ii).[9]

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[9] See Mich. Order ¶ 285 ("[T]he Commission, pursuant to section 271, must determine whether the BOCs have fully implemented the competitive checklist, which incorporates the section 252(d) cost-based standard.").

Section 252(d)(1) requires that prices for interconnection and network elements "shall be" based on cost, 47 U.S.C. § 252(d)(1) (emphasis added),[10] and the Commission has explained that averaged rates by definition do not reflect actual costs and that geographically deaveraged rates "more closely reflect the actual costs of providing interconnection and unbundled elements."[11] Therefore, if a BOC's rates for interconnection and unbundled network elements are not geographically deaveraged at the time the BOC files its section 271 application, it has not fully implemented the competitive checklist requirements that these rates shall be cost-based.

The Department's position that a transitional plan implementing geographically deaveraged rates over a period of time satisfies section 271(d)(3)(A)(i)'s "fully implemented" requirement cannot be reconciled with the statute's mandatory terms. A plan to comply in the future necessarily fails to comply now. For example, a deaveraged loop rate for the most densely populated areas in Louisiana is $10.12, whereas the statewide averaged rate adopted by the LPSC is $19.35. Decl. of Don Wood ¶ 26 (ex. H to MCI Comments); see also DOJ Eval. 25 n.46. A

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[10] See also Mich. Order ¶ 13 ("[T]he BOCs must offer at cost-based rates nondiscriminatory interconnection with their networks and access to unbundled network elements of their networks for use by competitors." (emphasis added)).

[11] First Report and Order, Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, 11 FCC Rcd 15499, 15999-16000, ¶ 764 (1996) ("Local Competition Order"), modified on recon., 11 FCC Rcd 13042 (1996), vacated in part, Iowa Utils. Bd. v. FCC, 120 F.3d 754 (8th Cir. 1997), modified, 1997 U.S. App. LEXIS 28652 (8th Cir. 1997); see also Mich. Order ¶ 292 ("Rates based on TELRIC principles for interconnection and unbundled network elements must also be geographically deaveraged to account for the different costs of building and maintaining networks in different geographic areas of varying population density." (emphasis added)).

BOC offering unbundled loops at the LPSC rate is offering loops at double their cost. This cannot be said to represent full implementation of the checklist requirement that rates for unbundled network elements shall be cost-based.

A BOC's commitment to geographically deaverage its loop rates over some transition period, like a BOC's promise to develop nondiscriminatory OSS, only means that someday the BOC may have implemented that checklist requirement. Meanwhile, however, competitors purchasing unbundled loops will be paying rates significantly higher than cost and, therefore, the cost of those loops for the period in which the competitor will serve those customers will be substantially in excess of cost.[12] If a BOC at the time of its application imposed a non-recurring charge that was double the forward-looking economic cost, but promised to reduce that charge to cost over a multi-year transition period, it would not have complied with and fully implemented the checklist requirement of cost-based rates at the time of the application. No principled basis exists for reaching a different conclusion when a failure to deaverage is the reason the recurring rates exceed forward-looking economic costs.

Further, a plan postponing implementation of cost-based rates is inconsistent with section 271's underlying purpose to promote competition in local markets and to ensure that long-distance companies have competitive alternatives if a BOC discriminates in providing local exchange or access services. As explained by the Commission,

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[12] DOJ does not appear to require a refund of earlier overcharges when geographically deaveraged rates are eventually implemented.

> If the local market is not open to competition, the incumbent will not face serious competitive pressure from new entrants, such as the major interexchange carriers. In other words, the situation would be largely unchanged from what prevailed before the passage of the 1996 Act. That is why we must ensure that, as required by the Act, a BOC has fully complied with the competitive checklist.

Mich. Order ¶ 18.

If rates for interconnection and unbundled network elements are not immediately cost-based, competitors will be deterred from entering local telecommunications markets and local competition will be delayed until rates are truly cost-based. As recently explained by the Chairman, "[i]f these prices [of network elements] are broadly averaged, it is likely that they will be far above economic cost in some areas -- and far below cost in others. Both results deter entry." Remarks of William E. Kennard to Practicing Law Institute (Dec. 11, 1997) (ex. B hereto). Non-deaveraged rates discourage the "efficient entry and utilization of the telecommunications infrastructure" sought by Congress, because the cost of entering markets in different regions will bear little or no relation to the economic cost of providing services to those regions. Local Competition Order ¶ 630. This contradicts section 271's very purpose.

B. The Department of Justice Position on Geographic Deaveraging Cannot Be Justified on the Ground That an Urban-to-Rural Subsidy Is Required Until New Universal Service Support Mechanisms Are Implemented.

The Department's position that geographically deaveraged rates may be implemented over a transition period finds no justification in the fact that new universal service support mechanisms will not be immediately implemented. See DOJ Eval. 25. Including a universal service support subsidy in the rates for interconnection and unbundled network elements is not

permitted by the statute.[13] Congress specifically provided, as discussed above, that rates for interconnection and unbundled network elements must be cost-based and, therefore, should not contain universal service subsidies, as this Commission has found.

> If a state collects universal service funding in rates for elements and services pursuant to section 251 and 252, it will be imposing non-cost based charges in those rates. Including non-cost based charges in the rates for interconnection and unbundled elements is inconsistent with our rules implementing sections 251 and 252 which require that these rates be cost-based.

Local Competition Order ¶ 713 (emphasis added). Thus, including a universal service support subsidy in the rates for interconnection and unbundled network elements would be inconsistent with section 252(d)(1).

As this Commission has found, such an approach is also prohibited by the requirement in sections 254(d)-(f) that universal service support be recovered in an equitable and nondiscriminatory manner from all providers of telecommunications services:

> We conclude that permitting states to include such costs in rates arbitrated under sections 251 and 252 would violate [sections 254(d) and 254(e)] by requiring carriers to pay specified portions of such costs solely because they are purchasing services and elements under section 251.

Local Competition Order ¶ 712. Including non-cost based charges in the rates for

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[13] Moreover, BOCs currently enjoy substantial, and more than sufficient, sources of implicit universal service support, such as inflated rates for business customers, intrastate and interstate access, intrastate toll service, and vertical features and services. In the Matter of Access Charge Reform, FCC 97-158, ¶ 11 (rel. May 16, 1997). There is no risk that these subsidies will be materially affected before the new universal service support mechanisms are fully implemented. See, e.g., In the Matter of Access Charge Reform, FCC 97-216, ¶¶ 14-20 (rel. June 18, 1997) (rejecting the argument that competition will erode universal service subsidies before the universal service fund is in place).

interconnection and unbundled network elements requires telecommunications carriers requesting interconnection or access to unbundled network elements "to make contributions to universal service support through such surcharges." Id. ¶ 713.

Accordingly, the Department's assertion that geographically deaveraged rates may be implemented over a transition period is not a permissible interpretation of the Act.

IV. CLECS ARE NOT LIMITED BY THE TAKINGS CLAUSE TO COLLOCATION IN ORDER TO COMBINE UNBUNDLED ELEMENTS.

AT&T explains the fallacy of BellSouth's assertion that permitting CLEC technicians to enter its central office would constitute a taking under Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Comments of AT&T Corp. in Opposition to BellSouth's Section 271 Application for Louisiana 21-23. MCI agrees that allowing CLEC technicians to enter BellSouth's central office plainly would not constitute a "permanent physical occupation" of BellSouth's property and therefore is not a taking under Loretto. 458 U.S. at 428. As AT&T observes, Loretto carefully and repeatedly distinguishes between temporary uses and permanent occupation. E.g., id. at 434 (citing authority for "the constitutional distinction between a permanent occupation and a temporary physical invasion").

Temporary access rarely rises to the level of a taking. To do so, it must constitute "a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed." Nollan v. California Coastal Comm'n, 483 U.S. 825, 832 (1987). If the right of entry does not deprive an owner of "all rights to regulate" access, it does not qualify as a taking. Dolan v. City of Tigard, 512 U.S. 374, 394 (1994); see also PruneYard Shopping Center v.

Robins, 447 U.S. 74, 83-84 (1980) (property owner's ability to impose reasonable time, place, and manner restrictions on access undermines takings claim). CLEC technicians will not be passing through BellSouth's central office in a continuous stream like beach goers on a summer day, and BellSouth can place reasonable restrictions on the time and manner of their access, just as it regulates the conduct of its own employees in those locations. Accordingly, the temporary presence of CLEC personnel to recombine UNEs does not constitute a taking of BellSouth's central office.

As a general rule, three factors bear on whether governmental action constitutes a taking: the owner's reasonable, investment-backed expectations regarding his property, the character of the action (e.g., whether it is a permanent physical occupation), and the economic impact of the action. Loretto, 458 U.S. at 432; see also Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 224-25 (1986); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). BellSouth has no reasonable expectation that its central office will remain inviolate. As a participant in a comprehensively regulated industry, BellSouth should have little expectation that its facilities are impregnable. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1007 (1984). BellSouth recognizes that section 251 gives CLECs the right to enter its central office to combine network elements; ironically, BellSouth's collocation-based approach would require a more extensive use of its premises than the much more limited access that CLEC technicians need to perform the combining function efficiently. More generally, the Act's far-reaching, pro-competitive design convincingly refutes any expectation that BellSouth can remain forever free

of competition and its inevitable side effects.[14]

As to the character of the contested action, the temporary presence of CLEC personnel in BellSouth's central office also argues strongly against the existence of a taking. As discussed above, no permanent physical occupation will occur. Loretto, 458 U.S. at 428. Moreover, if BellSouth does not want to provide any access at all, it can always provide currently combined network elements on a combined basis instead—an option involving no cost and no invasion.

Neither will BellSouth suffer any economic impact because the value of its central offices will be unimpaired by reasonable, nondiscriminatory access by CLEC technicians. The non-disruptive, temporary presence of CLEC personnel will leave no mark on BellSouth's central office. See, e.g., PruneYard Shopping Center, 447 U.S. at 83-84 (temporary, orderly presence of petition organizers does not impair value of mall). For example, recombining BellSouth network elements as they are already combined in their current configuration without any request for unbundled access, will not disrupt BellSouth's operations. Similarly, the temporary presence of CLEC personnel in no way results in the "complete destruction" of BellSouth's property rights in its central office. United States v. Security Indus. Bank, 459 U.S. 70, 75 (1982); see also Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-16 (1992) (regulation is taking if it

[14] By insisting that CLECs must recombine UNEs for themselves, BellSouth in fact has created the need for CLEC technicians to enter BellSouth's property. Beyond the obvious irony, BellSouth's position undermines any claim that it reasonably expects its central office to remain free of CLEC personnel. Taking the existence of section 251(c)(3) as a given—a point BellSouth does not contest—incumbents must anticipate that CLEC personnel may enter their property to carry it out.

destroys economic value of property). Accordingly, the temporary, non-disruptive, and non-damaging presence of CLEC personnel does not constitute a taking.

On a related point, even if the temporary visits of CLEC personnel otherwise did rise to the level of a taking, the CLECs' payments for the use of UNEs fully compensate BellSouth for those visits. By definition, where a property owner receives just compensation for the use of his property, he has no takings claim. U.S. Const. amend. V ("nor shall private property be taken for public use without just compensation"). The Act provides for BellSouth to receive compensation for the use of its UNEs at "rates . . . that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(3). If anything, the rates in Louisiana are too high, not too low. See MCI Comments at 53-63. And even if BellSouth had a legitimate objection to the rates, it had the right to challenge those rates in a federal court action under section 252.

Finally, MCI agrees with AT&T that the Act explicitly authorizes CLEC personnel to enter BellSouth's facilities to connect UNEs "at any technically feasible point." 47 U.S.C. § 251(c)(3). Moreover, even without this express authority, CLECs would possess the requisite authority by necessary implication. If an express grant of authority would be defeated without additional, unstated authority, the latter may be implied as "a matter of necessity." Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1446 (D.C. Cir. 1994). If, as BellSouth believes, CLECs are responsible for recombination under section 251(c)(3), they must be allowed to carry out that responsibility. To decide otherwise would delete section 251(c)(3) from the Act -- a result BellSouth no doubt would heartily endorse but that would contravene congressional intent and

the procompetitive policy embodied in the Act.

CONCLUSION

For the foregoing reasons, and the reasons set forth in MCI's initial Comments, BellSouth's application to provide in-region, interLATA services in Louisiana should be denied.

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December 19, 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of BellSouth Corporation,	)	CC Docket No. 97-231
BellSouth Telecommunications, Inc.	)	
and BellSouth Long Distance, Inc.	)	
for Provision of In-Region, InterLATA	)	
Services in Louisiana	)	

Exhibit A:
BellSouth Reply Brief, MCI v. BellSouth Corp. (N.D. Fla. Nov. 28, 1997)